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Carl C. Monk, *Remarks Delivered at the Conference of Religiously Affiliated Law Schools*, 78 Marq. L. Rev. 377 (1995).
Available at: <http://scholarship.law.marquette.edu/mulr/vol78/iss2/11>

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REMARKS DELIVERED AT THE CONFERENCE OF RELIGIOUSLY AFFILIATED LAW SCHOOLS

Commentary on Destro

CARL C. MONK*

This conference is an important milestone in legal education. I spoke with the Association of American Law Schools (AALS) President Renard Strickland and President-Elect Judith Wegner before coming here, and they join me in believing that this conference offers an excellent opportunity for dialogue on a number of issues important to both the Association of American Law Schools and its religiously affiliated member schools.

Let me begin by discussing some AALS programs that relate, at least peripherally, to some of the issues we will be discussing at this conference.

First, at our annual meeting in 1995 there will be a Dialogue on Accreditation Issues. The program will include panelists with different viewpoints about whether accreditation standards and membership requirements permit sufficient institutional autonomy. The panel will include university presidents, provosts, and deans. The Dialogue on Accreditation is not designed specifically to deal with issues regarding the AALS and religiously affiliated schools, but certainly in discussing institutional autonomy the dialogue is relevant to those issues.

Second, for the first time at the annual meeting, in 1994 the Executive Committee scheduled a program on emerging issues. The general theme for that was governance issues. In the context of the overall theme of governance, we broke out into small groups after the main program and discussed AALS governance and institutional governance. It is certainly possible that if we do an emerging issues program again, one of those breakout sessions could relate to the AALS and religiously affiliated schools.

Third, we have, for quite a few years, had what we call a forum slot at our annual meeting. This forum slot offers individual law professors or deans the opportunity to present a program on a particular topic. And we've had, I think, at least two of those in each of the last four or five years. If there is interest in your group in planning such a program, I

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invite you to let us know fairly soon, because planning for the annual meeting does take place early. I cannot assure you that you would get the exact time slot that you want. As you know, there is much competition for time slots, but I can assure you that if you are interested in the opportunity to continue a dialogue among yourselves, we would be delighted to have you do so. And when I say among yourselves, I certainly do not exclude a dialogue with the AALS, except that at the annual meeting we are often spread so thin that it is not the best opportunity to do it, and we might or might not be available. We would, however, try very hard to attend.

There has been much reference this morning to the MacCrate Report. The values section of the MacCrate Report is ignored too much and shows how those of us in legal education could benefit from the contributions of religiously affiliated law schools. Although secular law schools do not teach religious values in their curriculum, I know that religiously affiliated law schools are teaching far more than religious values in their curriculum. I suspect there is much that secular law schools could learn from you. The AALS will be having a day-long program on the MacCrate Report (the Mini-workshop on Professors in the Profession) at the 1995 annual meeting. I think at least a third of that will be devoted to a discussion of the values section, and I hope you will be able to attend and contribute to that program.

It would probably be counter-productive to the purpose of starting a constructive dialogue for me to respond today to some of the disagreements that I have with Bob's paper. I think the only thing I'd like to say substantively about that today is this: As we continue this dialogue, I believe it will be more productive for you and for the AALS if we talk about the ethics, morality, and wisdom of the AALS membership requirements, rather than their constitutionality. I think it is clear that the AALS is not imbued with the powers of the state, and therefore to refer to its actions as unconstitutional, or possibly unconstitutional, is probably not going to head us down the path that any of us want to follow. What we're really talking about is what are the ethics, what's the morality, what's the wisdom of whatever positions the AALS might take.

I'm sure that in the question-and-answer session you will tell me what concerns you have. I know that one of the major concerns is, of course, our sexual orientation nondiscrimination provisions. There has been reference to the report of the Executive Committee Regulation (ECR) 6.17 Working Group. I will not go into detail about that report, but I do want to tell you just a little bit about the working group that produced it.

This working group was appointed after the AALS amended its by-laws and Executive Committee Regulations to add the nondiscrimination standard based on sexual orientation. It was appointed specifically for the purpose of trying to address concerns of religiously affiliated AALS member schools, and to assure that we showed value for the contributions and the institutional diversity of our members.

You are the only ones who can judge whether the work of the group has been effective. I became executive director in about the middle of the working group's deliberations. And I must say I came in as something of a skeptic about the likelihood of success. I left, however, hoping that we could find a vehicle for replicating what occurred in that working group in a much larger setting. This working group consisted of three representatives of religiously affiliated law schools, two of whom are sitting right up here on the platform — Rudy Hasl and Reese Hansen. As I said to Reese already, I invite them to contradict, supplement, or support anything I might say about the working group's deliberations. The group also consisted of three members of our Executive Committee and three members of the Gay and Lesbian Legal Issues Section of the Association.

I am certain that very few people in religiously affiliated law schools or the Gay and Lesbian Legal Issues Section are totally satisfied with the product of the working group. But the reason I say I want to find a vehicle for replicating it on a larger scale is that I think it contributed significantly to the mutual understanding that members of the Gay and Lesbian Section and representatives of religious schools have about the deeply and sincerely held views of both groups. I think it was a marvelous process of human beings sitting together and learning to understand each other. But I know sometimes I exaggerate, so if Rudy and Reese think I have, then I invite them to say so.

I think the ECR 6.17 Working Group was part of a self-study process of the type that Bob Destro has called for. And by the way, I think his call for a self-study of our own regulations is unassailable. A self-study that focused not on the relationship of the AALS to religious schools, but on the accreditation process, started over five years ago with the appointment of what has become known as the McCarthy Committee because it was chaired by David McCarthy from Georgetown. That self-study is still in progress. And it is indeed an outgrowth of that process that has resulted in the amendments of some bylaws. We are still in the process of considering amendments to the curriculum and pedagogy bylaws. We had a program at our 1994 annual meeting to seek substantial input about that.

I would close by asking that when we do discuss this in the question-and-answer period, I hope you will share with me concerns other than the ones of which I already may be aware. I hope you will tell me what vehicles you think should be established for carrying on the dialogue that has begun today. I look forward to a very fruitful dialogue, and while I'm sure it won't be one in which everyone will end up satisfied, I hope it will be one with which we will all generally be pleased.

Certainly as Rex and Bob have pointed out this morning, we're talking about determining which values are so important that the AALS believes all of its member schools should adhere to them and which values should be left to individual schools to define for themselves, as we value institutional diversity, as well as diversity within schools. I do not pretend for a moment that this is an easy question for us to address, but ultimately I believe this is the question. We are talking about what we mean by diversity — both within the school and within institutions.

You have in your materials the report of the ECR 6.17 Working Group, but there is an additional document I have left on the table outside dated June 14, 1991, and addressed to law school deans from Betsy Levin (who was the AALS Executive Director). It talks about the history of the amendment of ECR 6.17. There is a statement in the comment that was made when Bylaw 6-4 was amended that relates to the question of how the AALS's Bylaws and Executive Committee Regulations regarding nondiscrimination fit within the AALS's purpose of seeking to improve the legal profession through legal education. Knowing that many questions are still unanswered, one of which is the definition of diversity that ought to be part of this discussion, I nonetheless want to quote briefly from that comment:

Diversity is thought to be essential to educate students both to participate effectively in the American legal profession and to develop a sense of professional commitment. Thus, diversity is important for its educational value. Moreover, because of a long history of law school exclusion, the Association deems diversity with regard to race, color and sex to be a minimal requirement of membership.¹

The meaning of diversity and the reasons for prohibiting sexual orientation discrimination, like other forms of prohibited discrimination, are what we will be discussing. I very much look forward to the discussion. I know our Executive Committee does as well. And I am very

1. ASSOCIATION OF AMERICAN LAW SCHOOLS, COMMENT ON PROPOSED AMENDMENT OF BYLAW SECTION 6-4 (1989).

sorry that I cannot remain at the conference to continue that discussion now. Thank you.

Final Report of the AALS Executive Committee

REGULATION 6.17 WORKING GROUP

I. INTRODUCTION

The principles set forth in this Report are intended to guide religiously-affiliated schools as they implement Bylaw Section 6-4(a) and revised Executive Committee Regulation (ECR) 6.17. They seek to strike a fair and sensitive balance between the values of religious liberty and nondiscrimination based upon sexual orientation. They are premised on the understanding that when applied to religiously-affiliated schools the absolute protection of the status of sexual orientation continues, but in the unique context of religious liberty, Bylaw 6-4(a) and ECR 6.17 should be interpreted to permit the regulation of conduct when that conduct is directly incompatible with the essential religious tenets and values of a member school. These principles will guide the Accreditation Committee in reviewing whether a member school is in compliance with the Association's Bylaws and Executive Committee Regulations.

It should be noted that several members of the Working Group remain troubled by principles that seek to distinguish conduct from status or orientation, believing that in practice the distinction will be difficult to apply, and that individuals should be free of discrimination because of private conduct that does not interfere with the discharge of their public responsibilities. However, in the interest of seeking mutual accommodation on the difficult issues that this Working Group has been asked to resolve, all members of the Working Group join in this Report.

II. HISTORY OF ECR 6.17

The forerunner of Bylaw Section 6-4(a) dates from 1951 and was aimed primarily at racial barriers in the admission of law students at a time when such barriers were still intact at a number of schools. In 1970, the Association amended the Bylaw to add the categories of "religion," "national origin," and "sex." In 1990, the Association expanded the categories to include "age," "handicap or disability," and "sexual orientation."

ECR 6.17 recognizes that a law school with a religious affiliation may adopt preferential admissions and employment practices *that directly relate to the school's affiliation or purpose* so long as:

1. notice of the practices is provided to members of the law school community . . . before their affiliation with the school . . .
2. the practices do not interfere with the school's provision of satisfactory legal education . . . because of lack of a sufficient intellectual diversity or for any other reason . . .
3. the practices are in compliance with Executive Committee Regulation 6.16 [academic freedom] . . .
4. the practices do not discriminate on the ground of race, color, national origin, or sex . . .
5. the practices contain neither a blanket exclusion nor a limitation on the number of persons admitted or employed on religious grounds.

In May 1991, the Executive Committee proposed to amend ECR 6.17, to include in condition 4 (barring discrimination) the three categories, among them "sexual orientation," which the Association had added to Bylaw 6-4(a) the year before. To allow member schools more time to consider the revision, the Executive Committee reissued the proposed change in August 1991. The amended regulation became effective in October 1991 when far fewer than one-fourth of the member schools expressed an objection.

Nevertheless, the Executive Committee in November 1991 voted to create a representative Working Group to consider issues likely to arise as to the meaning, the scope, and the implementation of the revised ECR 6.17. The Executive Committee took this action because it recognized that the regulation standing alone might not be sufficiently textured to guide a member school in the specific instances where the principles of religious liberty and nondiscrimination seemed to clash. The Executive Committee charged the Working Group to explore fully the various implementation issues and to ensure that all views received careful consideration.

III. ACTIVITY OF THE WORKING GROUP

As the first step in discharging its mandate, the Working Group attended an Open Forum on Revised ECR 6.17, which was held at the AALS Annual Meeting on January 5, 1992. Thirteen persons spoke, voicing a broad range of opinion, and their transcribed remarks were provided to the Working Group.

The Working Group then drafted and mailed a questionnaire to the 34 religiously-affiliated member schools. The questionnaire was designed to help the Working Group better understand the exact nature of the tension, where one existed, between a school's religious mission and the implementation of ECR 6.17. The deans who received the ques-

tionnaire were urged to reply fully and candidly, in order to give the Working Group a secure factual basis for its final report.

Happily, and helpfully, the response was excellent. Twenty-four of the thirty-four schools, including eight schools that had opposed the revised ECR 6.17, completed the questionnaire, and the deans of several of the remaining schools spoke informally to Working Group members. The AALS office tabulated the questionnaire responses and prepared summaries for the Working Group members.

The survey summaries and other material examined by the Working Group made clear that religiously-affiliated schools, including some affiliated with the same church, often have quite different institutional cultures, and that a single-minded, highly restrictive set of guidelines, which treated all schools alike, would confront, in some instances, strongly held articles of faith or standards of personal conduct. On the other hand, it was also clear that in some matters the revised ECR 6.17 would present no conflict with a school's essential religious tenets.

The Working Group met initially in March 1992. As a result of this meeting, the Working Group reached a consensus as to a set of guidelines for implementing revised ECR 6.17, which the Executive Committee reviewed in August 1992. The Executive Committee decided that it should give Working Group members the opportunity to share the draft guidelines with the deans of religious schools and the leaders of the Section on Gay and Lesbian Legal Issues. Because of comments that the draft guidelines received, the Executive Committee voted at its November 1992 meeting to reconvene the Working Group, to supplement its membership, and to ask the Group, using the draft guidelines as a baseline, to consider whether changes were possible that would accommodate the various comments.

The expanded Working Group met on February 26-27, 1993. Based upon its discussion at that meeting, and conversations that have since taken place, the Working Group has agreed upon a revised set of principles. While substantially faithful to the draft guidelines of the year before, this draft takes into account concerns expressed with the earlier version.

IV. IMPLEMENTATION PRINCIPLES

The purpose of this portion of the Report is to identify areas where the Association's interest in protecting the autonomy of religiously-affiliated schools and in prohibiting discrimination against persons identified in ECR 6.17 may appear to come into conflict and to set out ways in

which those interests should be accommodated within the framework of that regulation.

In making these recommendations, the Working Group was guided by its recognition of the important values that underlie the Association's long-standing policies against discrimination. At the same time, the Working Group recognized that, considering the contributions to legal education made by religiously-affiliated schools and the importance of protecting religious liberty, it is in the Association's interest that ECR 6.17 be interpreted in a manner that does not require a religiously-affiliated law school to act inconsistently with essential elements of its religious values and tenets.

Because of the critical and complex nature of the tension that sometimes may occur between these two concerns, it would be impossible in any report to specify in detail all the situations that may arise and how they should be resolved. Nonetheless, some basic principles can be identified as a means of understanding how ECR 6.17 should be interpreted. Further, basic notions of fairness suggest that clear notice of the special values and tenets that infuse a particular religiously-affiliated institution, including in this context any codes of conduct that bar all nonmarital sex, should be given to all student, staff, and faculty applicants so that the special character of the school is clearly understood by possible members of the community.

To achieve these objectives, the AALS Executive Committee adopted the following principles to guide the application and interpretation of revised ECR 6.17.

INTERPRETIVE PRINCIPLES

These principles are intended to guide religiously-affiliated member schools as they implement Bylaw Section 6-4(a) and revised ECR 6.17. They seek to strike a fair and sensitive balance between the values of religious liberty and nondiscrimination based upon sexual orientation. These principles are based on the premise that Bylaw 6-4(a) protects against discrimination on the basis of sexual orientation. When applied to religiously-affiliated schools, that absolute protection of the status of sexual orientation continues, but in the unique context of religious liberty, Bylaw 6-4(a) and ECR 6.17 should be interpreted to permit the regulation of conduct when that conduct is directly incompatible with the essential religious tenets and values of a member school. These principles will guide the Accreditation Committee in reviewing whether a member school is in compliance with the Association's Bylaws and Executive Committee Regulations.

1. **We reaffirm that the academic freedom principles set forth in ECR 6.16 bind all member schools.** This principle in no way changes the current situation, since religiously-affiliated schools have never been exempt from academic freedom principles. However, it is important to recognize that, insofar as alleged discrimination occurs in a context that also suggests the denial of academic freedom, the fact that the acts occurred as a result of a religiously held tenet and value in no way alters the need to determine whether the individual's academic freedom has been denied.

2. **No school may make any direct inquiry into the sexual orientation of applicants for admission or candidates for faculty or staff positions.** Given the importance of assuring the privacy interests of applicants, this principle affirms that inquiries into an applicant's sexual orientation are proscribed.

3. **No individual or organization of students, staff, or faculty should suffer disadvantage solely because of the status of the individual's sexual orientation or the organization's focus on the subject of sexual orientation.** Recognition of individual dignity and the need for all persons to coexist require all institutions to refrain from discrimination based solely on the identified status of an individual or on an organization's focus on the subject of sexual orientation. This principle recognizes that students, staff, and faculty have a right to establish such organizations. At the same time, however, religiously-affiliated institutions that have core values directed toward conduct within their communities are entitled to protect those values if they do so in a manner consistent with principle #4 below.

4. **In any circumstance in which a school finds that the conduct of an individual or an organization conflicts with the religious values of the school, the school shall make a good faith examination whether and in what ways it can accommodate the rights of the individual or the organization under Bylaw 6-4(a) consistent with the school's essential religious tenets, and it shall act accordingly.** The key to coexistence and tolerance between groups of divergent beliefs is the willingness to try to accommodate each other's beliefs to the fullest extent possible. In affirming the essential importance of both religious liberty and nondiscrimination, this principle provides that religiously-affiliated schools will periodically review and evaluate their policies and procedures so that exclusion of members from or limitation on the participation of members within the law school community based upon conduct occurs only to the extent necessary, in compelling circumstances, and when essential religious tenets require such a result. The conclusions reached after such a searching

inquiry may change over time, since few things remain static, and this principle affirms the continuing need for careful and serious reflection when the invocation of a particular rule or tenet threatens the right of an individual or an organization to be free of discrimination. This principle is not designed to suggest the appropriate outcome of any particular conflict, but it does impose a good faith obligation on the institution to make whatever accommodations appear feasible under the circumstances presented. Moreover, if the essential religious tenets lead to a prohibition of all nonmarital sexual conduct, the school must, nevertheless, comply with Bylaw 6-4(a), which prohibits differences in treatment based on sexual orientation.

5. Religiously-affiliated schools have an obligation to give clear notice of the religious tenets and values of the institution to prospective members of the law school community prior to their affiliation with the school. This notice requirement parallels that now found in ECR 6.17, which pertains only to the preference that institutions may give to their coreligionists. However, the requirement seems equally important here, to the extent that the preceding principles acknowledge that there may be some circumstances in which, because of a deeply held religious tenet and value, a particular religiously-affiliated institution may engage in practices that otherwise would be deemed to violate the regulation. It is most important that individuals seeking to become members of a particular law school community become fully aware of the culture of the institution so that they can make informed decisions about whether they will feel comfortable in an environment where they will be expected to conform their behavior to those tenets and values. In this regard, if the school has a conduct code that implicates the concerns addressed in these Interpretive Principles (including a ban on all nonmarital sexual conduct), the school's bulletin and admissions materials should state these restrictions clearly so as to avoid misunderstanding.

Respectfully submitted,
Curtis J. Berger, Chair
Barbara Cox
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Rudolph Hasl
Richard Huber
Mary Kay Kane
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ADDITIONAL STATEMENT OF
BARBARA COX, ARTHUR LEONARD, AND ROBERT WASSON

The undersigned members of the Working Group wish to record their reservations about the distinction between sexual orientation and sexual conduct contained in the report. We believe that it is inappropriate for law schools to inquire into or take adverse action on the basis of the private, consensual sexual behavior of students, faculty, and staff, unless such behavior involves inappropriate exploitation of employer-employee or faculty-student relationships. We find the concepts of sexual orientation and sexual conduct to be so intertwined in so many spheres that we believe they cannot realistically be disentangled for purposes of providing protection against discrimination.

Conduct is often initiated in private and intended to remain private, and only becomes public through the action of others. Persons acting in the same way may be treated differently by a school on the basis of the accident of discovery of the activity. Forcing the sexual orientation/sexual conduct distinction places a premium on remaining undisclosed and undetected. We are troubled to the extent that a nondiscrimination By-law intended to reduce the cost of being "out of the closet" would do just the opposite.

We understand that some religiously-affiliated schools may be constrained by current doctrinal commands of their sponsoring religious bodies where issues of conduct are concerned. For the limited purpose of describing how religiously-affiliated schools may comply with the Association's Bylaws and Executive Committee Regulations, we acknowledge that a distinction between sexual conduct and sexual orientation may be necessary to provide the maximum protection from discrimination presently attainable. We hope, however, that the time will come when religiously-affiliated institutions will revise their policies to provide appropriate respect for the privacy of their community members.